No. 76-1543

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIO J. GRASSO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1543

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIO J. GRASSO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

---

1. We submit that this case is controlled in substantial measure by *Lee* v. *United States*, No. 76-5187, decided June 13, 1977, and that it would be appropriate to reverse summarily the judgment of the court of appeals or to remand for further consideration in light of *Lee*.

Lee held that when an indictment or information is dismissed in mid-trial on the defendant's motion, for reasons not inconsistent with reprosecution, a second trial does not violate the Double Jeopardy Clause. In this case, respondent sought to have the indictment dismissed or obtain a judgment of "acquittal" because of alleged prosecutorial misconduct. Thus respondent, like Lee, sought to terminate his trial without receiving any disposition of the general issue of guilt or innocence. The district court granted that termination by declaring a

mistrial; that action contemplated that respondent might be reprosecuted. Here, as in *Lee*, *supra*, slip op. 7: "The [termination] clearly was not predicated on any judgment that [respondent] could never be prosecuted or convicted * * *." Because respondent vigorously sought a termination of his trial, reprosecution is permissible under the principles of *Lee* and *United States* v. *Dinitz*, 424 U.S. 600.

The court of appeals concluded (Pet. App. 9a-17a) that the district court should have explored alternatives to the declaration of a mistrial, and that a second trial is impermissible here because such an exploration might have led to a conclusion that a mistrial was unnecessary. But the same could have been said in *Lee*: the information could have been amended to eliminate the defect that led to its dismissal, and such an amendment would have prevented the need for a second trial. No one raised the possibility of amendment, however, and this Court did not find it significant that the district court had not explored this possibility (see *Lee*, *supra*, slip op. 3-4 n. 2, 10-11). When a trial is terminated in response to a request by the defendant, the district court need not explore options that the defendant did not suggest.[1]

Respondent contends that this case may be distinguished from *Lee* because he asked for a dismissal of the indictment with prejudice rather than for a dismissal that

[1]This is not a case in which the trial was terminated over the defendant's opposition; respondent avidly sought a termination of some sort. The Court therefore need not consider whether the district court *sua sponte* must raise and explore alternatives to mistrial when the defendant invokes his right to present his case to the jury in the first trial. See *United States* v. *Gentile*, 525 F. 2d 252 (C.A. 2), certiorari denied, 425 U.S. 903. Questions concerning the need to explore alternatives when the defendant objects to a termination are presented in *Arizona* v. *Washington*, No. 76-1168, certiorari granted, April 18, 1977.

would permit a second trial (Br. in Opp. 13-15). The Court's analysis in *Lee*, however, turns on a conjunction of two factors: whether the defendant sought a termination of the trial before the disposition of the issue of guilt or innocence, and whether he received a termination that was not inconsistent with further proceedings. Both of these conditions obtain here.

The court of appeals concluded (Pet. App. 13a-16a) that respondent was not entitled to a termination of any sort, and that the trial should have proceeded to verdict. The fact that respondent requested an unjustified dismissal of the indictment rather than an unjustified mistrial should not affect the double jeopardy analysis. The central point is that respondent asked for, and received, a termination of his trial and at no point indicated a desire to obtain at that trial a resolution of the issue of guilt or innocence. Here, as in *Lee*, respondent could have obtained a resolution of guilt or innocence if he had wished to do so, preserving for post-verdict proceedings or appeal his claim that the trial was tainted by prosecutorial misconduct.[2] The proceedings "were terminated at the defendant's request and with his consent" (*Lee*, *supra*, slip op. 10), and a second trial therefore may be held.

2. If the Court disagrees with our submission that this case should be summarily reversed or, alternatively, remanded for reconsideration in light of *Lee*, then we

[2]The prosecutor asked the court to carry on with the trial (Pet. App. 32a), which was terminated only because respondent had contended that it was hopelessly contaminated by error. The district court agreed with the assessment that the trial had become bogged down, although he did not share respondent's belief that the prosecutor was to blame (*id.* at 31a). It seems evident that respondent could have obtained a decision on the merits simply by asking for it; he stood instead on his argument that error required the trial's termination.

believe that it should defer acting on the petition until it has decided several other cases that might affect the present case. We discussed in our petition (Pet. 8, 10) the way in which *Crist* v. *Cline*, No. 76-1200, jurisdiction postponed, April 25, 1977, and *Arizona* v. *Washington*, No. 76-1168, certiorari granted, April 18, 1977, are related to this case.[3]

The Court also has granted review in *Sanabria* v. *United States*, No. 76-1040, certiorari granted, June 27, 1977, which is discussed in our petition. *Sanabria*, like *Lee*, involves a mid-trial termination based upon a perceived defect in the charge: in *Sanabria* the court went on to "acquit" the defendant because of the defect. The present case, unlike *Sanabria*, does not involve a purported "acquittal" or an assessment of guilt or innocence of respondent in light of the indictment and the evidence received at trial, and although *Sanabria* may clarify some of the issues left open in *Lee*, it is unlikely to bear strongly upon this case.[4]

The Court's disposition of *United States* v. *Scott*, petition for a writ of certiorari pending, No. 76-1382, might have a greater bearing on the present case. Our supplemental memorandum in *Scott* asks the Court to set that case for plenary review in order to address a question left open in *Lee*: whether a second trial may be held when an indictment is dismissed with prejudice in mid-trial, at the defendant's request, for a reason unrelated to

---

[3]See also note 1, *supra*. We have furnished to counsel for respondent a copy of our memorandum as *amicus curiae* in *Crist*.

[4]It is possible, however, that the Court will find it necessary in *Sanabria* to address some of the arguments we have made in *United States* v. *Scott*, petition for a writ of certiorari pending, No. 76-1382, which is discussed in the text. To this extent *Sanabria* may have issues in common with this case.

guilt or innocence.[5] In the present case the prosecution was not terminated with prejudice, but respondent's argument rests in substantial measure on the supposition that, if the district court had granted respondent's motion for dismissal with prejudice because of "prosecutorial misconduct," then a second trial could not have been held even if the dismissal were clearly erroneous. Since a second trial could not have been held after such a dismissal with prejudice, respondent argues, it may not be held after a declaration of a mistrial.

Respondent's argument is unpersuasive. Even if the Court should conclude in *Scott* that a second trial may not be held after certain dismissals that are unrelated to guilt or innocence, it would not follow that a second trial could not be held here. "The critical question is whether the order [actually entered] contemplates an end to all prosecution of the defendant for the offense charged" (*Lee*, *supra*, slip op. 7), and the order granting a mistrial in the present case unmistakably did not contemplate an end to the prosecution of respondent. A decision by this Court in *Scott* disagreeing with our position there would not assist respondent. On the other hand, if, as we argue in *Scott*, a defendant may be tried a second time when a court erroneously grants a motion to dismiss with prejudice for reasons unrelated to guilt or innocence, then respondent could have been tried a second time if the district court had granted his motion to dismiss with prejudice because of prosecutorial misconduct, and it should not make a difference that the court granted a mistrial rather than such a dismissal. See *Lee*, *supra*, slip op. 7-8 and n. 9 (immaterial that court granted dismissal rather than mistrial).

---

[5]We have furnished a copy of our supplemental memorandum in *Scott* to counsel for respondent.

For the reasons discussed in this memorandum and in our petition, the Court should grant this petition, summarily reverse the decision of the court of appeals, and remand the case for trial; alternatively, it should vacate the judgment of the court of appeals and remand for further consideration in light of *Lee*. If the Court decides not to follow either of these courses of action, then it should defer disposition of the petition until it has decided *Crist*, *Arizona*, *Sanabria* and *Scott*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

DOJ-1977-07